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Deposited in DRO:

10 January 2016

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Hernández, G.I. (2013) 'Beyond the control paradigm? International responsibility and the European Union.', in The Cambridge yearbook of European legal studies. Volume 15, 2012-2013. Oxford: Hart Publishing, pp. 643-668.

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<https://www.bloomsburyprofessional.com/9781782253372>

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BEYOND THE CONTROL PARADIGM? INTERNATIONAL RESPONSIBILITY AND THE EUROPEAN UNION

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From the perspective of public international law, the legal personality of the European Union carries with it the possibility for the Union to exercise rights and to bear obligations on the international plane. The Union's quasi-federal structure, however, requires consideration as to how these rights and obligations may be exercised. In this piece, two regimes are compared: the Union's rights and obligations as an international organisation, and the possibility that the Union's internal structures might be recognised on the international plane, thus leading to more complex notions of subsidiary responsibility, shared between the various levels of European governance.

I. INTRODUCTION

Legal personality may be primarily a technical question, but in the case of the European Union, it represents a claim to a coherent identity on the international plane; with respect to third States, it represents a willingness to assume responsibility. Within public international law, the accommodation of the European Union's desire (and purpose, as expressed in the treaties) to act collectively has raised interesting questions with respect to the Union's external legal personality and the accommodation of this desire within the international legal order.

The question is not merely semantic: if the European Union structures are in fact closer to a federation of States as is often claimed by European Union legal scholars,¹ then scholarly treatment of the European Union as an international actor cannot be limited by a dogmatic insistence that it is a 'mere' international organisation. At the heart of this study is an attempt to think a bit more broadly about the precise place of the European Union at international

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¹ R Schütze, 'On "Federal" Ground: The European Union as an (Inter)national Phenomenon' (2009) 46 *CML Rev* 1105, 1105; cf A Dashwood, 'The Relationship between the Member States and the European Union/Community' (2004) 41 *CML Rev* 355, 356 ('a federation of sovereign States').

law. Although the Union's genesis as an international organisation² is a necessary starting-point of the analysis, increasing constitutionalist and federalist structures at the European level suggest that evolution in the Union's purpose and functions also require some reflections at the international level. To this end, two specific features of the Union's international personality, its treaty-making power and its responsibility for internationally wrongful acts, will be considered here. The major question in this study relates to the international legal effects of the internal allocation of competences between the European Union and the Member States, and whether they are to be understood through the control paradigms favoured by the International Law Commission in its 2011 Articles on the Responsibility of International Organisations (ARIO).³ Accordingly, this paper will consider whether the (limited) accommodation of federal structures within international law can extend to the Union, or whether a special regime drawing from both paradigms can be elucidated in respect of it. Some final reflections on the nature of shared responsibility will conclude this piece.

A note on terminology: purely for linguistic consistency, this study uses the term 'European Union' broadly, as the all-embracing entity within which all European integration has taken place. Since its entry into force in 2009, Article 1(3) of the Treaty of Lisbon⁴ provides that the EU 'shall replace and succeed the European Community', and as such the Union is the successor entity to the previously-existing international personality of the EC with respect to the first pillar, even as it expands that international personality throughout the Union's work.⁵ The most important provision in European law is Article 47 of the Treaty of

² *Ibid*, 1079: the Union's 'birth certificate' is an international treaty.

³ Articles on the Responsibility of International Organizations, with commentaries, in *Report of the International Law Commission on the work of its sixty-third session*, UN Doc A/66/10, in (2011) *Yearbook of the International Law Commission* vol II, pt 2 (hereinafter 'ARIO' or the 'Articles').

⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community (signed 13 December 2007, entered into force 1 December 2009), [2010] OJ C83/01, art 47.

⁵ And thus to the EC's treaty-making power: Select Committee on European Union, *The Treaty of Lisbon: An Impact Assessment (Tenth Report)* (HL 2008, 62-I), evidence of Sir Francis Jacobs to the House of Lords, Select Committee, S148. See also: R Schütze (n 1) 1105, fn 2.

Lisbon: ‘The Union shall have legal personality’. Although this provision is primarily of a confirmatory nature, resolving the debates as to the Union’s legal personality from 1992 until 2009,⁶ it confirms what is generally viewed as a legal reality and establishes a series of legal and practical implications. As such, for the purposes of this paper, there is no need to distinguish between the two, given that the treaty obligations of the former Community are now assumed by the European Union.⁷ Thus, the term ‘European Community’ or ‘EC’ will be used purely in its historical context, to refer to legal arrangements and practices made prior to the succession of the Community by the Union.

II. THE UNION’S RELEVANT LEGAL STRUCTURES: INTERNATIONAL PERSONALITY, *JUS TRACTATUUM*

A. The International Personality of the European Union

Since the ECJ’s famous judgment in *Van Gend en Loos*, the European legal order has been described as a ‘new legal order of international law’.⁸ With respect to the division of powers between the Member States and the principal organs of the Union, this is relevant; and a great many competences are expressly recognised within the framework of the EC treaties as falling exclusively with the EC and not with Member States.⁹ Since the succession of the EU

⁶ Prior to 2009, only the European Community had legal personality: see art 281 of the Consolidated Treaty Establishing the European Communities (previously art 210 of the Treaty establishing the European Economic Community) (signed 25 March 1957, entered into force 1 January 1958) [2006] OJ C321/E/37 (hereinafter ‘EC Treaties’). For a review of the evolution of the Union’s personality vis-à-vis that of the Community between 1992 and 2007 see D McGoldrick, ‘The International Legal Personality of the European Community and the European Union’ in M Dougan and S Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Oxford, Hart Publishing, 2009) 181, 195–201.

⁷ This is confirmed in a series of succession letters that the Council of the European Union and the European Commission sent jointly to the EU’s treaty partners and the depositaries of multilateral conventions at the end of 2009.

⁸ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, para 12. The ‘international’ has in fact been dropped in later formulations: see D McGoldrick (n 6) 182.

⁹ The breadth of these areas exceeds the scope of this study, but they are as follows. Some articles in the EC Treaty (n 6) made express provision for the EC to enter into international agreements: those relating to common commercial policy (art 133 EC), ‘association agreements’ with third States (art 310 EC), the environment (art 174 EC), development cooperation (art 181 EC), monetary or foreign exchange regime matters (art 111 EC), education, vocational training and youth (art 149(3) and 150 EC), culture and public health (art 151 EC), and research and technological development (art 170 EC).

to the EC, further rights and obligations have been added to these legal bases for the Union's competence.¹⁰

When acting externally, first the Community and now the Union was represented by the Commission, which negotiated on the basis of authorisation from the Council, which would then conclude the agreements in its own name.¹¹ With respect to treaties under which it has been allowed to become a party, the Community's practice was always to deposit and express statement of its competence with respect to that treaty.¹² For those conventions relating to subjects over which the EC had competence, but where membership is limited only to States, under Community law the Member States parties to that treaty were effectively acting as 'trustees' for the Community.¹³ These practices have continued under the Union.

Interestingly, most such agreements grant rights and impose duties on the Member States, and not on the Union separately, thus avoiding proceedings and claims involving the Union directly.¹⁴ This suggests that primary responsibility rests predominantly with the Member States, and perhaps with European Union institutions; but responsibility with the Union *as such* has not been the intention of the Member States. For the purposes of international

¹⁰ Article 216, para 1 of the Treaty on the Functioning of the European Union, (signed 18 December 2007, entered into force 1 December 2009) [2008] OJ C115/47 is the general provision, allowing the EU to conclude an agreement with one or more third States or an international organisation where the treaties provide, or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Art 217 allows the EU to conclude association agreements; Art 207 TFEU allows it to conclude treaties on common commercial policy; Art 218 TFEU subsumes art 300 of the EC Treaty and art 24(6) of the pre-2007 TEU (foreign policy treaties); and art 219 of the TFEU makes provision for negotiations and conclusion of international agreements concerning economic and monetary union.

Several specific provisions also allow this: see eg art 8 of the revised TEU, on developing special relationships with neighbouring States, art 37 allowing the Union to conclude agreements with States or international organisations in areas covered by the CFSP; Art 79(3) TFEU, on concluding agreements with third States for the readmission to their countries of origin or provenance of third-country nationals; Art 209 TFEU, relating to the objectives referred to in art 21 TFEU, on the Union's external action, and art 208 TFEU, on development cooperation; Art 214 TFEU, on humanitarian aid.

¹¹ Article 300 EC Treaty (n 6). See P Eeckhout, *Relations of the European Union*, 2nd edn (Oxford, Oxford University Press, 2004), 170.

¹² A Aust, *The Modern Law of Treaties*, 2nd edn (Cambridge, Cambridge University Press, 2007) 140.

¹³ A term borrowed from M Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union' in: A Arnulf, C Barnard, M Dougan and E Spaventa (eds) *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Oxford, Hart Publishing, 2011) 435.

¹⁴ D McGoldrick (n 6) 202.

personality, it seems that the *jus tractatum* is treated separately from responsibility arising under the obligations so assumed.

From the outset, the European Union/Community's treaty-making power was limited to areas within their competence.¹⁵ Yet the European Court of Justice has, over the years, expanded the Community's treaty-making powers to a wide variety of areas under its competence through the doctrine of 'parallel external powers',¹⁶ not dissimilar to the Belgian *in foro interno, in foro externo* principle that will be addressed below. According to the parallel competences principle, first articulated in the famous *ERTA*¹⁷ and *Opinion 1/76*¹⁸ judgments, and now codified in Art 3(2) TFEU,¹⁹ the competence of the European Union/Community to enter into international agreements was deemed to run in parallel to the development of its competence over certain spheres internally.²⁰ The parallel external powers doctrine also entails that, within European law at least, EU Member States are deprived of their treaty-making power to the extent that its exercise will affect internal European law.²¹ Member States, under such a scenario, would act as 'agents', or even 'trustees'²² of the Union.

¹⁵ At that time, international agreements under the Common Commercial Policy and Association Agreements with third States or international organisations: see arts 113 and 238 of the 1958 EC Treaty (n 6).

¹⁶ See generally R Schütze, 'Parallel External Powers in the European Community: From "Cubist" Perspectives towards "Naturalist" Constitutional Principles?' [2004] 23 *Yearbook of European Law* 225.

¹⁷ Case 22/70 *Commission v Council* (AETR) [1971] ECR 263, para 90: 'In carrying on the negotiations and concluding the agreement simultaneously in the manner decided on by the Council, the Member States acted, and continue to act, in the interest and on behalf of the Community in accordance with their obligations under article 5 of the Treaty'.

¹⁸ Opinion 1/76 re *Draft Agreement establishing a European Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741.

¹⁹ Article 3(2) TFEU (n 10) grants the European Union an exclusive external competence where an international agreement 'is necessary to enable the Union to exercise its internal competence'.

²⁰ In Case 22/70, *Commission v Council* (*ERTA*) [1971] ECR 263, paras 15–6, 23–7, the treaty-making power of the Community was presumed as an additional instrument to implement the Community's competence under the common transport policy. See also Opinion 2/91 (*ILO Convention No 170*) [1993] ECR I-1061, paras 15–17, where the very fact of the Union's internal competence to adopt social provisions was sufficient to imply an external power to conclude international treaties on all such purposes.

²¹ Ibid, para 18. See also: R Schütze, 'Federalism and Foreign Affairs: Mixity as an (Inter)national Phenomenon' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: the EU and its Member States in the World* (Oxford, Hart Publishing, 2010) 57, 77.

²² See generally: M Cremona (n 13): the 'trustees' doctrine there articulated suggests that, when the Union cannot act externally because it lacks the capacity to act internationally, its Member States must conclude or amend international agreements on its behalf.

What is relevant for our purposes is that the European Union/Community as an actor has consistently asserted its right to act internationally in all policy areas falling within its competence, and asserted an autonomous identity and capacity to act on the international plane.²³ The right to do so has been upheld by the ECJ.²⁴ Given the express provision of Article 47 of the Treaty of Lisbon, there is no need to consider whether the Union has any sort of ‘implicit’ personality. In any event, even before 2007, the European Community engaged in extensive international practice, concluding well over fifty UN multilateral conventions²⁵ and acceding to various international organisations, including the World Trade Organisation.²⁶ The European Union’s practice has generally related to its powers under security and defence under Article 24 TEU, concluded its first agreement in April 2011, with the Federal Republic of Yugoslavia,²⁷ and has since concluded well over 70 agreements on the basis of its competence under Article 24 TEU.²⁸ It has also entered into agreements with international organisations²⁹ and certain third States;³⁰ more recently, it has ratified the UN Convention on the Rights of Persons with Disabilities.³¹ That it is active is thus not open to serious question; and what needs to be addressed is the legal framework through which such acts must be tested.

²³ See J d’Aspremont, ‘A European Law of International Responsibility? The Articles on the Responsibility of International Organizations and the European Union’, in V Kosta, N Skoutaris and V Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford, Hart Publishing, forthcoming 2014). Available at: ssrn.com/abstract=2236070, 2.

²⁴ Most prominently in Case 22/70 *Commission v Council (AETR)* [1971] ECR 263, para 14. For further discussion, see P Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing, 2006), 77 et seq.

²⁵ *Ibid*, 137–81, where Koutrakos enumerates these. In some of these cases, it is sole party to the treaties, whilst in other cases it is a party alongside some or all of the Member States.

²⁶ See Opinion 1/94 *re WTO Agreement* [1994] ECR I-5267, discussed in P Eeckhout (n 11), 27–35 and 87–95.

²⁷ Status of Mission Agreement, [2001] OJ L125/2. See also: A Sari, ‘Status of Forces and Status of Mission Agreements under the EDSP: The EU’s Evolving Practice’ (2008) 19 *European Journal of International Law* 67.

²⁸ R Gosalbo Bono, ‘Some Reflections on the CFSP Legal Order’ (2006) 43 *CML Rev* 337.

²⁹ See EU-NATO Agreement of 14 March 2003, [2003] OJ L80/35; and EU-ICC Agreement of 10 April 2006, [2006] OJ L115/50.

³⁰ See EU-EC-Switzerland Schengen Association Agreement of 2004 (and Protocol on the Accession of Liechtenstein of 2006) and EU-EC-Iceland-Norway Schengen Association Agreements of 1999.

³¹ See International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, GA Res 61/106, Annex I, UN GAOR, 61st Sess, Supp No 49, at 65, UN Doc A/61/49 (2006), entered into force May 3, 2008.

B. Consequences of International Personality of the European Union

It is a truism that any entity possessing international legal personality possesses rights and duties under international law. When applied to the European Union, the legal personality as separate from that of its Member States entails that the Union have international rights and obligations distinct from those of its members.³² It is clear that sovereignty is not *required* in order to hold international legal personality, as explained the International Court of Justice with respect to the legal personality of the United Nations,³³ which derives its international personality from its capacities and obligations under international law. The ICJ there was careful to emphasise that international legal personality can be *objective*, in that entities can exist within the international legal system even in relation to other entities which have not consented to their existence (in that case, States not parties to the United Nations Charter):

[F]ifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.³⁴

However, there are two important distinctions to be drawn. First, unlike the essentially regional nature of the European Union, the UN's international personality was derived from the near-universal participation of States then existing, drawn from all continents, regions and cultural groups: it was a genuine public international organisation. Secondly, the ICJ's conclusion as to the international personality of the UN was of that of an *international organisation*, with functional personality based on the powers that had been accorded to it by contracting States. No-one contests that such personality would accrue to the European

³² C Tomuschat, 'The International Responsibility of the EU' in E Cannizzaro (ed), *The EU as an Actor in International Relations* (Kluwer, The Hague, 2002), 177.

³³ As the ICJ noted in *Reparation for Injuries*, Advisory Opinion, ICJ Reports 1948, 174, international personality is the 'capacity to be titular to international rights and obligations', concluding ultimately, 179, that the United Nations, as an international organisation with 'objective international personality', also was the bearer of rights and duties under international law. This rather expansive definition also admits that subjects of international law need not be identical in their nature; nor must their rights and obligations be of the same kind and extent.

³⁴ *Reparation for Injuries* (n 33), 185.

Union; it is the special status that some seek to accord the Union under international law that is problematic.

The next sections will therefore consider, respectively, the standard regime for the responsibility of international organisations, as adopted by the International Law Commission's recently adopted Articles on the Responsibility of International Organisations for Internationally Wrongful Acts (the 'Articles' or 'ARIO')³⁵, before turning to the Union's claims for a *sui generis* or special status.

III. APPORTIONING RESPONSIBILITY: EUROPEAN UNION AND THE ILC ARTICLES ON THE RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

A. General Rules: Setting the Scene

It is a basic principle of responsibility at international law that a breach of an international obligation that is attributed to an international legal person entails the responsibility of that person for the breach. This principle is codified both in the ASR and in the ARIO.³⁶ Such breaches, if they constitute an act or omission that is attributable to the international organisation, constitute an internationally wrongful act of that organisation.³⁷ Although many of the Articles broadly transpose principles already existing in relation to the responsibility of States, the most important general rules on attribution are contained in Article 6, paragraphs 1 and 2, according to which the conduct of organs or agents of an international organisation are attributed to that organisation if such conduct is in the performance of their functions. Any analysis of this is generally – but not exclusively – done in accordance with the rules of that

³⁵ Above (n 33). It has been suggested by S Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in M Ragazzi (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter* (The Hague, Brill, 2005) 412, that a similar provision to Article 5 ASR should be embodied in the DARIO, whereby situations where the conduct of member States, when acting as 'agents' of international organisations, would entail the attribution of such conduct to the organisation itself.

³⁶ Article 2 ILC Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, in *Report of the International Law Commission on the work of its fifty-third session*, UN Doc A/CN.4/SER.A/2001/Add 1, in (2001) *Yearbook of the International Law Commission* vol II, pt 2 (hereinafter 'ASR' or the 'Articles on State Responsibility'). With respect to international organisations, this principle is codified in art 4, para 2, of the ARIO (n 3).

³⁷ Article 4, para (b), ARIO (n 3).

organisation.³⁸ Another important rule is contained in Draft Article 7, which allows for the conduct of an organ or agent of a State placed at the disposal of an international organisation to become attributable only to the receiving organisation.

Although it is true that in the European legal order, a Member State can act as an organ of the Union,³⁹ this view has been expressly rejected on the international plane by the International Law Commission under Article 60 ARIO.⁴⁰ Member States of the European Union thus do not constitute organs or agents of the Union on the international legal plane. Nor can acts of Member States be considered to be ‘at the disposal’ of the European Union through the mere operation of European law: there must be ‘factual control that is exercised over the *specific* conduct taken by the organ or agent placed at the receiving organization’s disposal’.⁴¹

The consequences of the agency principle embodied in Draft Articles 6 and 7 remain unclear. Take, for example, the issue raised in relation to actions by States parties to the ECHR performed as part of UN peacekeeping operations in Kosovo. In *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*,⁴² the issue arose of the attribution of the acts of Member States to the international organisation (in this case, the United Nations); it was claimed that these were acting as agents of the international organisation. Although operational command remained with KFOR and the participating States, the European Court attributed the acts being challenged to the United Nations, given

³⁸ ARIO (n 3) Commentary to Article 6, 19, para 9: the rules of the organisation are not the only criterion, leaving open the possibility that in exceptional circumstances, functions may be considered as given to an organ or agent even if this is not based on the rules of the organization.

³⁹ See eg E Paasivirta and PJ Kuijper, ‘Does One Size Fit All? The European Community and the Responsibility of International Organizations’ (2005) 36 *Netherlands Yearbook of International Law* 169, 192.

⁴⁰ Gaja suggested that this internal view went against the case law of the European Court of Human Rights: see International Law Commission (G Gaja Special Rapporteur), *Seventh Report on Responsibility of International Organisations* (27 March 2009), UN Doc A/CN.4/2009, 12-13 (para 33), he invoked *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 1995) para 153 and Joined Cases C-402/05 P and C-415/05 P *Kadi, Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, para 313. In his 8th Report, A/CN.4/640, 37, he invoked the *Kokkelvisserij v Netherlands* App no 13645/05 (ECtHR, 20 January 2009).

⁴¹ ARIO (n 3) Commentary to Article 7, para 2.

⁴² *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*, *Admissibility Decision* App nos 71412/01 and 78166/01, (ECtHR, 2 May 2007).

that KFOR's mandate emanated from 'delegated' powers of the Security Council according to Chapter VII.⁴³ Pursuant to this finding, the ECHR declared the claim inadmissible *ratione personae*, in a judgment very much criticised by the ILC.⁴⁴ The basic criticism of the ILC is that the European Court incorrectly applied the 'effective control' test envisaged by it in a previous version of the ARIO. According to the ILC, when applying the criterion of effective control, 'operational control' over a specific act should have been more significant than 'ultimate' control: 'the latter hardly implies a role in the act in question'.⁴⁵

There are, however, a number of other specific rules on the responsibility of an international organisation that would not be limited to States acting as its organs or its agents. Articles 14 to 19 ARIO concern the responsibility of international organisations when their conduct is connected to the act of a State or another international organisation. Article 14 acknowledges the indirect responsibility of an international organisation for the breach of international law for aid or assistance in the commission of an internationally wrongful act. Such aid or assistance of the international organisation must be 'significant'.⁴⁶ Article 15 suggests that an international organisation which directs and controls a State in the commission of the internationally wrongful act is internationally responsible for that act. The wording of Article 15 ('that act') suggests that the international organisation involved is responsible for the *same act* as the offending State (or international organisation).⁴⁷ It is true that the concept of 'direction and control', called *normative control*⁴⁸ by some, can

⁴³ *Ibid*, para 141.

⁴⁴ ARIO (n 3) Commentary to Article 7, 21, para 10.

⁴⁵ *Ibid*. The International Law Commission has a long footnote in its Commentary to Article 7, *ibid* 23; see eg A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008) 8 *Human Rights Law Review* 151; P Klein, 'Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt *Behrami* et *Saramati*', (2007) 53 *Annuaire français de droit international* 43, 55; KM Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', (2008) 19 *European Journal of International Law* 509, 521–522; Bodeau-Livinec, Buzzini, and Villalpando (2008) 102 *American Journal of International Law* 323 (note), 329.

⁴⁶ ARIO (n 3) Commentary to Article 14, 37, para 4.

⁴⁷ See 7th Report by G Gaja (n **Error! Bookmark not defined.**) para 18.

⁴⁸ A term borrowed from S Talmon (n 35) 405.

encompass cases in which an international organisation takes a decision binding its members.⁴⁹ But such ‘control’ must be a case of domination over the internationally wrongful act and not merely the exercise of oversight, and ‘direction’ must connote ‘actual direction of an operative kind’.⁵⁰ Responsibility relating to the adoption by an organisation of a decision that is binding on its members is covered under Article 17, but that article only applies to circumvention: the adoption of the decision by the international organisation must intend to take advantage of the separate legal personality of its members to avoid compliance with an international obligation.⁵¹ Because when non-directly effective provisions are in issue (for example, a Union Directive), Member States of the European Union can have discretion in how they implement binding Union acts,⁵² it would only apply if compliance with the binding decision ‘necessarily entails circumvention’.⁵³ Finally, although Article 16 suggests that an international organisation is responsible if it coerces a State into committing an internationally wrongful act, the adoption of a binding decision by an international organisation is not considered coercion except under exceptional circumstances: nothing less than ‘conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercive’ actor.⁵⁴

B. Regional Economic Integration Organisations, *lex specialis*, and the European Union

The European Commission has long expressed ‘concerns as to the feasibility of subsuming all international organizations under the terms of this one draft in the light of the highly diverse nature of international organizations, of which the European [Union] is itself an

⁴⁹ ARIО (n 3) Commentary to Article 15, 38, para 4.

⁵⁰ *Ibid*, quoting from the ASR (n 36) Commentary to Article 17 of the ASR, para 7, from which the principle was taken.

⁵¹ ARIО (n 3) Commentary to Article 17, 41, para 4.

⁵² See *Bosphorus* (n **Error! Bookmark not defined.**) para 157.

⁵³ ARIО (n 3) Commentary to Article 17, 41, para 7.

⁵⁴ ARIО (n 3) Commentary to Article 16, 40, para 4, citing ASR (n 36) Commentary to Article 18, para 2.

example’.⁵⁵ It put forward that a distinctive regime ought to apply to so-called ‘regional economic integration organisations’ (REIOs), in the form of special rules for attribution of conduct to the Union and other similar organisations; in practice, this designation would apply only to the Union at present.⁵⁶ Such a differentiated approach would be justified not only by the Union’s exercise of certain competences, but on the notion that its Member States have engaged a permanent transfer of ‘sovereign powers’ relating to those competences to the supranational level.⁵⁷

Although the International Law Commission has been hostile to recognising the European Union as a *sui generis* organisation, echoing concerns from the European law perspective,⁵⁸ it has nevertheless left the door open with Article 64 ARIO, which allows that special rules that might govern the existence of an internationally wrongful act would supersede the general regime under the doctrine of *lex specialis*. Such special rules of international law may be contained in the constitutive instruments of the organisation; in fact, the Commentary to Article 64 refers expressly to the existence of special regimes relating to ‘the attribution to the European Community (now Union) of conduct of States members of the Community when they implement binding acts of the Community’.⁵⁹ The ILC carefully

⁵⁵ International Law Commission, Sixtieth session Geneva, (5 May – 6 June and 7 July – 8 August 2007), Responsibility of international organizations: Comments and observations received from international organizations, UN Doc A/CN.4/582, 4.

⁵⁶ D McGoldrick (n 6) 191, points out that some treaties, such as the Marrakech Agreement Establishing the World Trade Organization (entered into force 15 April 1994), 1867 UNTS 3, make special provision for the European Union (at Article XI), or by reference to ‘regional economic integration organisations’, which in practice only covers the Union.

⁵⁷ E Paasivirta and PJKuijper (n **Error! Bookmark not defined.**) 188–92.

⁵⁸ From the European law perspective, R Schütze (n 1) 1091, also takes issue with the *sui generis* argument for several reasons: 1) it lacks explanatory value, being based in conceptual tautology that asserts no room for analysis; 2) it views the Union in *negative* terms, and thus indirectly perpetuates the concept of indivisible sovereignty; 3) the *sui generis* classification fails to capture the European Union’s evolution over the last decades; 4) the *sui generis* classification is historically unfounded, as ‘[a]ll previous existing Unions of States lay between international and national law’.

⁵⁹ International Law Commission, Report of its 61st Session (2009), Commentary on Article 63, UN Doc A/64/10, 176, para 2. See remarks by F Hoffmeister, ‘Litigating Against the European Union and its Member States: Who Responds under the ILC’s Draft Articles on International Responsibility of International Organizations?’ (2010) 21 *European Journal of International Law* 723, 729–730.

considered much of the relevant case law from the ECtHR, the WTO and the ECJ,⁶⁰ only to observe laconically that the special rules governing the relations between international organisations and their members might be relevant in attributing responsibility between them. The Commentary to Article 64, moreover, makes clear that it is modelled on Article 55 of the ASR,⁶¹ the commentary to which in turn emphasises that the *lex specialis derogate legi generali* principle can only apply as *between* the parties to an agreement containing the special rule⁶². It is difficult to distil from this the possibility that the special rule or exception would have any objective value.

Despite the ILC's position, the European Union persists in emphasising that the draft articles, in their final form, 'do not sufficiently address the special characteristics of the European Union as a regional integration organisation'.⁶³ There is a serious conceptual flaw, however, in relying blindly on this argument; it would suggest that the internal rules of any organisation could have an objective character, binding third States, which would constitute a 'clear denial of the specific and internal nature of the rules of international organisation'.⁶⁴ It would also have the effect of modifying the rights and obligations of third parties in a manner going far beyond the ICJ's limited attribution of international personality to the United Nations in *Reparation for Injuries*. The concern expressed here is not to continue with the outdated line of reasoning that any internal rules on competence be 'irrelevant' in relations with third parties, as is the case with federal States. Such an exception ought not to be rooted

⁶⁰ ARIIO (n 3) Commentary to Article 64, 101, paras 3–6; *M & Co v Germany* App no 13258/87 (ECtHR, 9 February 1990) 138; *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs — Complaint by the United States* ("EC – Trademarks and Geographical Indications (US)"), WT/DS174/R; *Bosphorus* (n **Error! Bookmark not defined.**); *Kokkelvisserij* (n **Error! Bookmark not defined.**).

⁶¹ *Ibid*, 102, para 7.

⁶² ASR (n 36), Commentary to Article 55, 140, paras 1–2.

⁶³ EU Statement - United Nations 6th Committee: Report of the International Law Commission on Responsibility of International Organisations, Statement on behalf of the European Union by Lucio Gussetti, Director, Principal Legal Adviser, European Commission, at the UN General Assembly 6th Committee (Legal) 66th Session: Report of the International Law Commission on the work of its sixty-third session on Responsibility of International Organisations, 24 October 2011.

⁶⁴ J d'Aspremont (n 23) 10.

purely in the internal rules of the European legal order.⁶⁵ Instead, it is submitted here that the existence of any *lex specialis* as to the character of the EU's division of competences between the Union and its Member States would thus be applicable in cases where the EU's division of competences is *recognised* by third parties, much in line with the practice of the federal States described above. Several multilateral agreements that are open to EC/EU accession make specific provision for this.⁶⁶ Moreover, Article 64 of ARIO confirms that international law would be able to accommodate such an exception for the EU and similar REIOs, provided that the Union and its Member States were able to obtain recognition of the European legal order in their relations with third parties.⁶⁷

IV. A NEW CONCEPTION FOR THE EUROPEAN UNION?

The DARIO paradigm of apportioning responsibility according to control is reassuring to the international lawyer: it provides a framework for accommodating the European Union within existing structures, avoiding the fatuous and unhelpful *sui generis* categorisation, and it is efficient, providing an element of legal certainty. Because of international law's insistence on the indivisibility of sovereignty, it is true that the European Union finds itself pushed into the uncomfortable conceptual duality of either being an international organisation or a federal

⁶⁵ *Ibid*, 9, referring to Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility', ACIL Research Paper No 2011-03 (SHARES Series), 29.

⁶⁶ *Ibid*, 3, referring to art 305(1)(f) of the United Nations Convention on the Law of the Sea, (signed 10 December 1982, entered into force 16 November 1994), 1833 UNTS 396; the 1995 Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, A.CONF.164/37 (8 September 1995); the 1994 WTO Agreement (n 56); the Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998), 2080 UNTS 95, which expressly uses the term REIO; Art 13 of the 1985 Vienna Convention for the Protection of the Ozone Layer (signed 22 March 1985, entered into force 22 September 1988), 1513 UNTS 323; Art 22 of the 2000 United Nations Framework Convention on Climate Change (signed 29 May 1992, entered into force 4 March 1994) 1771 UNTS 107; Art 34 of the 1992 Convention on Biological Diversity (signed 5 June 1992, entered into force 29 December 1993), 1760 UNTS 79; Art 36 of the 2000 Cartagena Protocol on Biosafety (signed 29 January 2000, entered into force 11 September 2003), 2226 UNTS 208; and the 2000 United Nations Convention Against Corruption (signed 31 October 2003, entered into force 14 December 2005), 2349 UNTS 41.

⁶⁷ F Hoffmeister (n 59) 746: 'the conduct of a State that executes the law or acts under the normative control of a regional economic integration organization may be considered an act of that organization under international law, taking account of the nature of the organization's external competence and its international obligations in the field where the conduct occurred'. He calls for an explicit acknowledgment rather than the implicit one in art 64, 746–747.

State,⁶⁸ yet without either of these categories fully capturing the overlapping conception of sovereignty embodied by the Union; and then, because it is not a State, by default it is regarded as an international organisation.⁶⁹ If the European Union is more than a ‘mere’ international organisation, and in fact has created a ‘municipal order of transnational dimensions, of which it forms the “basic constitutional charter”’,⁷⁰ more complex possibilities emerge beyond the control paradigm of attributing international responsibility to an organisation in accordance with the ARIO. For this reason, the rest of this article will explore a possible alternative paradigm: the European Union as a ‘federation’, a supranational entity under international law. If a federation can also go beyond describing federated entities *within* States (‘federal States’) and can also describe the interstices between an international person and a State,⁷¹ some careful reflection is necessary as to the wider implications of federations *beyond* States. Although it is true that most of the practice that will be surveyed covers sub-State federated entities, certain principles about the division of sovereign powers could, by analogy, apply to the European Union as a supranational federal entity.

A. Federations, Federal States, and International Law

As a general rule, international law deems as irrelevant the internal structures of federal States. This principle is codified in Article 7, paragraph 1, of the International Law Commission’s Articles on State Responsibility: ‘the conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question’.⁷²

⁶⁸ R Schütze (n 1) 1092.

⁶⁹ *Ibid.*

⁷⁰ See AG Maduro, Case C-402/05 P *Yassin Abdul Kadi v Council of EU and Commission of EC* [2008] ECR I-06351, citing Case 294/83 *Les Verts* [1986] ECR I-1339, para 23.

⁷¹ R Schütze (n 1) 1088.

⁷² ASR (n 36) 45. This reprises the essence of Article 3 of the Harvard Draft Code on International Responsibility (1929) 23 *American Journal of International Law* 131, 145: ‘a state is not relieved of

According to the Commission, the responsibility of the federal State is engaged by conduct incompatible with its international obligations, ‘irrespective of the level of administration or government at which the conduct occurs’.⁷³ The principle holds even when, under internal law, the federal government is powerless to compel a sub-State (federated) entity to comply with an international obligation, as was demonstrated in the *LaGrand* case before the ICJ.⁷⁴

It should be pointed out, however, that this general principle does not exclude *a fortiori* the apportioning of joint or equal responsibility onto the federated entity, and ought best to be seen as neutral.⁷⁵ Neutrality does not automatically exclude the ability of federated entities to conclude international agreements with outside governments that are willing to enter into treaty relations with them. As such, international law does not remain oblivious to the internal divisions of ‘federal States’⁷⁶ that apportion competences normally falling to a State between two or more orders of government.⁷⁷ Hence, the domestic constitutional arrangements of several federal States make provision for their respective federated entities to exercise a *jus tractatum*; and in fact, several third States have willingly entered into treaty relations with such entities.

responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent too which the national government, according to its constitution, has control of the subdivision.’

⁷³ *Ibid* 39, para 5.

⁷⁴ *LaGrand (Germany v United States of America)*, Provisional Measures, [1999] ICJ Rep 9, at 16, para 28. See also *LaGrand (Germany v United States of America)*, Judgment, [2001] ICJ Rep 466, 495, para 81.

⁷⁵ See I Bernier, ‘Remarks: ASIL/CCIL Joint Panel on the Conduct of International Relations in Federal States’ (1991) *Proceedings of the American Society of International Law* 132, 135.

⁷⁶ A colourful definition of a federal State is that it is a ‘pluralistic democracy in which two sets of governments, neither being fully at the mercy of the other, legislate and administer within their separate and yet interlocked jurisdictions’: I Duchacek, ‘Perforated Sovereignities: Towards a Typology of New Actors in International Relations’ in HJ Michelmann and P Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (Oxford, Clarendon, 1990) 1, 3.

⁷⁷ According to W Rudolf, ‘Federal States’ in R Wolfrum (ed), *Max-Planck Encyclopaedia of Public International Law* (Oxford, Oxford University Press, 2012) vol III, 1136, para 4, only 18 States are properly constituted as federal States: Argentina, Australia, Austria, Bosnia-Herzegovina, Brazil, Canada, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Russia, South Africa, Switzerland, Tanzania, the United Arab Emirates, the United States and Venezuela. Serbia and Montenegro has since formally dissolved. To this one can add Belgium, a federal State in all but name.

B. Federated States: Practice

There is ample practice in relation to the treaty-making power exercised by federated entities,⁷⁸ but there seem to be two distinct phenotypes of federal States with respect to *jus tractatum*: those that provide for constitutionally-defined powers for federated entities (called ‘open’), and those that apportion exclusive treaty-making powers onto the federal government (termed ‘closed’).⁷⁹ These have been described elsewhere,⁸⁰ but will be briefly surveyed here. Amongst the ‘open’ federations, through Article 32 of the Basic Law, Germany’s *Länder* possess the right to conclude treaties with foreign States.⁸¹ Although the federal government can conclude treaties with respect to subjects falling within its field of exclusive legislative competence,⁸² it may also enter into treaties concerning subjects over whom it has concurrent legislative powers,⁸³ or where it possesses the right to enact general rules.⁸⁴ A similar arrangement may be found in Article 16, paragraphs 1 and 2, of the Constitution of Austria, which grant the *Länder* an international treaty-making power, although this power is limited to matters falling within their exclusive competence and only with neighbouring States, and also subject to certain residual rights of the federal State.⁸⁵ Article 56, para 1 of the 1999 Constitution of the Swiss Confederation provides that the

⁷⁸ An important work in this respect was that of L di Marzo, *Component Units of Federal States and International Agreements* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980).

⁷⁹ The terminology of ‘open’ and ‘closed’ federations is developed in B Fassbender, *Der offene Bundesstaat* (Tübingen, Mohr, 2006).

⁸⁰ The practices of the United States, Canada, Australia, Germany, Austria, Switzerland and Belgium are canvassed in more detail in GI Hernández, ‘Federated Entities in International Law: Disaggregating the Federal State?’ in D French (ed), *Statehood and Self-Determination* (Cambridge, Cambridge University Press, 2013), 491, 494–500.

⁸¹ Treaty practice in Germany is conducted in accordance with the *Lindauer Abkommen* (Lindau Agreement) of 14 November 1957 between the Federal Government and the *Länder* governments, reprinted in H Dreier (ed), *Grundgesetz Kommentar*, 2nd edn (Tübingen, Mohr Siebeck, 2006) vol II, 794–95, through which the *Länder* agreed to delegate their agreement-making powers so as to allow the federal government to conclude treaties in its own name on subjects deemed to be predominantly of federal concern.

⁸² Article 73 of the Basic Law.

⁸³ So-called ‘*konkurrierende Gesetzgebungszuständigkeit*’: Art 74 of the Basic Law.

⁸⁴ So-called ‘*Rahmengesetzgebungszuständigkeit*’: Art 75 of the Basic Law.

⁸⁵ F Cede and G Hafner, ‘Republic of Austria’ in DB Hollis, MR Blakeslee and LB Ederington (eds), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden, Brill, 2005) 59, 61. The pre-1992 Constitution of the Socialist Federal Republic of Yugoslavia, at art 271(2), provided for a similar competence for the federal republics.

cantons may conclude agreements with foreign States ‘within the scope of their powers’,⁸⁶ and Article 55 provides for cantonal participation in the negotiation of foreign policy by the Confederation. Finally, Belgium’s 1993 Coordinated Constitution enshrines an *in foro interno, in foro externo* principle similar to the European Union’s ‘parallel external powers’ principle, through which domestic divisions of competence, between both different regions as well as between linguistic communities, are made operative in international relations.⁸⁷ Accordingly, if the Flemish or Walloon regional government is competent internally for a given domain, in relation to the said domain it is automatically competent externally to enter into internationally binding agreements.⁸⁸

The federated entities that compose the United States⁸⁹ and Canada,⁹⁰ despite the treaty-making power being an exclusive prerogative of the federal government, nevertheless engage in limited treaty-making. In the Canadian example, this is facilitated through a system of *accords cadres*⁹¹ through which the Canadian federal government and a third State together recognise explicitly that agreements between a Canadian province and that State will be

⁸⁶ Article 56, paras 1–2. See also: L Wildhaber, *Treaty-Making Power and Constitution* (Basel, Helbing & Lichtenhan, 1971) 315; and VEB 24 (1954) No 5 (Switzerland). In Switzerland, the cantons have a limited international legal personality (*petite personnalité*); the Swiss Constitution thus leaves some limited room for the cantons to appear as subjects of rights and duties under international law.

⁸⁷ See arts 167–9 of the 1993 Coordinated Constitution of Belgium.

⁸⁸ See, eg the agreements of the three Belgian regional governments with France and the Netherlands for the protection of the Scheldt: Belgium (Brussels-Capital, Flanders, Wallonia Regional Governments)-France-Netherlands: Agreements on the Protection of the Rivers Meuse and Scheldt, Charleville Mezières (France), 26 April 1994, (1995) 34 ILM 854 (Scheldt); (1995) 34 ILM 859 (Meuse). Art 9 of each of the two agreements requires each of the regional governments separately to notify France upon the completion of their required domestic procedures for entry into force, *ibid*, 858.

⁸⁹ The Constitution of the United States of America, art 1, s 10, cl 3, provides that ‘no state shall, without the consent of Congress ... enter into any agreement or compact with ... a foreign power’.

⁹⁰ British North America Act 1867, 30 & 31 Vict, ch 3, (also ‘Constitution Act 1867’, name changed by the Constitution Act 1982, itself Sch B to the Canada Act 1982 (UK), ch 11), s 91 (enumerating federal powers) and s 92 (enumerating provincial powers)). S. 132 of the British North America Act 1867 assigns to the federal Parliament ‘all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries’ (emphasis added).

⁹¹ Canada insists on these *accords-cadre*, and refuses to recognise its provinces’ international agreements as such unless it has consented to them: see M Copithorne, ‘Canada’ in DB Hollis, MR Blakeslee and LB Ederington (eds), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden & Boston, Brill, 2005) 91, 103.

binding under international law⁹². The United States follows a similar practice, although US states have occasionally concluded unauthorised agreements with foreign federated entities,⁹³ usually Canadian provinces, a recent example being Missouri and Manitoba in 2000.⁹⁴ Thus, constitutional authorisation is not as such required for international treaty-making by the non-State legal order in a federation.

One common facet unifies these varied examples: the internal power to enter into international agreements is bereft of legal effect unless a willing treaty partner may be found who is willing to *recognise* the internally-determined capacity of the federated entities to allow for bilateral relationships between third parties and a federated entity. In short, there must be a willingness and recognition from prospective treaty partners to regard the federated entity as capable of entering into treaty relations, which is a question of international law.⁹⁵ There is no question that a domestic constitutional provision by itself would suffice to create international legal personality for a federated entity: it is only when both these cumulative conditions are met that the federated entity could be regarded as having some form of international legal personality, one essentially relative vis-à-vis foreign States that recognise

⁹² An example of this is the Franco-Canadian Cultural Agreement (France-Canada), 17 November 1965, Can TS 1965/21, reprinted in (1965) 17 *External Affairs* (Canada) 514, which has allowed for Quebec and France to enter into a number of agreements: see eg the exchange of letters, dated 23 and 27 December 1963, between the French Ambassador in Ottawa and the Department of External Affairs of Canada (in respect of technical co-operation); and exchange of letters, dated 27 February 1965, between the Secretary of State of External Affairs of Canada and the French chargé d'affaires (in respect of cultural affairs).

⁹³ The US Supreme Court stated in *Virginia v Tennessee* (1893) 148 US 503, 518, that the prohibition against the conclusion of 'treaties' found in art I, s 10 of the United States Constitution did not apply to agreements concerning such minor matters as the adjustment of boundaries, which have no 'tendency to increase and to build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States'.

⁹⁴ The earliest example being North Dakota's administrative interstate agreements with Canadian municipalities, upheld by the Supreme Court of North Dakota in *McHendry County et al v Brady* 37 North Dakota 59, (1917) 163 NW 540 (United States). In 2000, Missouri concluded a Memorandum of Agreement with Manitoba on water issues without Congressional authorisation: see the letter from William H Taft IV, the Legal Adviser to the US Department of State, to Senator Byron Dorgan of North Dakota 'Capacity to Make: Role of Individual States of the United States: Analysis of Memorandum of Understanding between Missouri and Manitoba' 2001 Digest A (United States), 179–98. See also: I Duchacek, 'Perforated Sovereignities: Towards a Typology of New Actors in International Relations' in HJ Michelmann and P Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (Oxford, Clarendon, 1990) 1, 20, which also mentions the jointly financed water development in the Souris River Basin, linking Saskatchewan, North Dakota and Manitoba.

⁹⁵ See GJ Perrin, *Droit international public: sources, sujets, caractéristiques* (Zürich, Schulthess, 1999), 562; J Salmon, 'Conclusions' in *Les États fédéraux dans les relations internationales* (Brussels, Bruylant, 1984) 505, 507.

that entity. In the absence of such recognition, the internal structures of the federal State become immaterial.

V. MIXED AGREEMENTS: TOWARDS SHARED/JOINT RESPONSIBILITY?

A. Recognition

i. The Multiplicity of Treaty-making Powers under European Law

If one compares the treaty practice of federal States with that of the European Union, one of the most interesting parallels relates to practice. The fact that, under European law, Member States no longer enjoy plenary treaty-making powers is in contrast with the view under public international law, where European treaty obligations are no more, and no less, than *delegated* treaty powers. This divergence raises serious questions as to the certainty of obligations and the ability of a government to bind itself at international law. European Union law has developed a number of mechanisms through which it enhances the predictability and stability of its treaty agreements with third States:

Shared competence (Articles 4(1) and (2) TFEU): by contrast, shared competence both the Union and the Member States may assume international obligations, but where the latter may only exercise their competence to the extent that the Union has not (Article 2(2) TEU). Both are seen to enjoy competence over a given field; however, once the Union has exercised its competence, the Member States may no longer exercise theirs. In the case of conflict between European Union acts and pre-existing acts of the Member States, the latter acts are ‘disapplied’.⁹⁶

Concurrent powers (Article 4(4) TFEU) between the Union and the Member States, where the Union’s competence to enter into agreements does not affect the competence of the

⁹⁶ R. Schütze, ‘Supremacy Without Pre-emption? The Very Slowly Emerging Doctrine of Community Pre-emption’ (2006) 43 *CML Rev* 1023, 1028–9. The principle of disapplication is embodied in Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

Member States to conclude agreements in the same field.⁹⁷ Both the Union and the Member States may independently enter into treaty relations without necessarily consulting one another. In practice, under Article 4(4) TFEU these concurrent powers are the exception rather than the rule, and are limited to development cooperation and humanitarian aid. Article 209(2) TFEU, accordingly, allows the Union to conclude international agreements with ‘third countries and competent international organisations’ on questions of development cooperation, ‘without prejudice’ to Member States’ competence to negotiate in international bodies and to conclude agreements on similar issues. The practice of concurrent powers was broader in earlier treaty provisions: for example, Article 6(2) of the TEU required that the EU join alongside, rather than supersede, Member States in the realm of human rights.

Finally, there are other possible modes of treaty-making, exercised by both the Union and its Member States on the international level: *complementary competences*, where the Union may set minimum standards but where Member States can go beyond that standard;⁹⁸ and *coordinating competences*, where the Union level may provide an ‘elastic framework of orientations’ but where Member States may choose how to implement policy.⁹⁹ Yet another mode, of *joint competence*, where the Union must act jointly with the Member States, was abolished in the Treaty of Lisbon.¹⁰⁰

In order to accommodate these complex variations in relation to competence, the long-standing practice of the Community and then the Union has been to enter into ‘mixed agreements’, through which the EU and some/all of its members appear as contracting parties

⁹⁷ R Schütze, ‘The European Community’s Federal Order of Competences—A Retrospective Analysis’ in Dougan and Currie (eds) *50 Years of the European Treaties* (Oxford, Hart Publishing, 2009) 63, 74–5, points out that the concurrent nature of these competences is only temporary: as the Union begins to exercise competence in these fields, the Member States lose their competence.

⁹⁸ From the EC Treaty (n 6), arts 175–6 EC (environmental policy) and 137 EC (social policy); Art 153 (consumer protection); 152 EC (protection of public health); Art 63(1)–(2) EC (visa and asylum matters).

⁹⁹ Articles 2 and 5 TFEU (n 10); R Schütze, ‘Lisbon and the Federal Order of Competences: a Prospective Analysis’ (2008) 33 *European Law Review* 709, 717, characterises coordinating competences as normatively stronger than complementary competences, but somewhat less so than shared competences.

¹⁰⁰ See, eg art 35 EC, relating to the CAP, 180 EC, which obliges the Community and Member States to coordinate their policies on development and cooperation and art 133(6) EC, on trade in cultural and audiovisual services, educational services and social and human health services.

with third States.¹⁰¹ Under mixed agreements, both the Union and its Member States are seen as having assumed an international obligation that parallels the internal delineation of competence between them, which can lead to varying modes and degrees for liability for the different levels of governance.¹⁰² One would think that these mixed agreements would constitute recognition of the exclusive rights of the Union to act internationally, as well as its exclusive responsibility in the case of a breach.¹⁰³ But this is not always the case: practice relating to the WTO Agreement, to which both the European Union and its Member States are now parties, demonstrates the difficulties in accommodating the internal division of competences between the European Union and its Member States.

ii. Limitations to the Exclusivity Approach: The World Trade Organisation

With explicit special provision for the European Community/Union and its laws,¹⁰⁴ the WTO's practice clearly confirms the Union's capacity to respond to claims for its activities falling within its competence.¹⁰⁵ The WTO's practice suggests that it is prepared, although not without some difficulties, to allow the Union to stand and to exclude the responsibility of

¹⁰¹ R Schütze (n 21) 80, who recalls that the first mixed agreement concluded by the EEC was the 1961 Agreement establishing an association between the European Economic Community and Greece [1963] OJ L26/294, and suggests that some one-fifth of all Community agreements are mixed.

¹⁰² F Hoffmeister (n 59) 744.

¹⁰³ But cf A Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17(4) *European Foreign Affairs Review* 491, 508, who objects to the practice of declarations of competence being made alongside mixed agreements, on the basis that these do nothing to resolve the concerns over legal certainty that could be raised by third parties.

¹⁰⁴ Where the EC appears as a party and is exclusively responsible at the WTO, this proceeds relatively smoothly; eg as of 2012, the EC had been involved in 87 cases as a complainant, in 70 as a respondent, and yet another 118 as a third party. Conversely, the member States have only participated in some 13 disputes: see A Delgado Casteleiro and J Larik, 'The "Odd Couple": The Responsibility of the EU at the WTO' in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013) 233, 239. More than half (266 of 438) of the disputes brought before the WTO DSB and AB involve the European Union as a party; yet within the European legal order itself, there seems to be a reluctance to ascribe community liability: see eg Joined Cases C-120/06P and C-121/06P *FIAMM and Georgio Fedon & Figli v Council and Commission* [2008] ECR I-06513, where it was concluded that there could be no community liability for damages from EC non-compliance with WTO agreements.

¹⁰⁵ F Hoffmeister (n 59) 730. See also: P Eeckhout, 'The EU and its Members States in the WTO – Issues of Responsibility' in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (New York, Oxford University Press, 2006) 449.

its Member States.¹⁰⁶ In *EC-LAN*, although it merged complaints lodged against the United Kingdom and Ireland into a single claim against the Union, the WTO DSB fell short of declaring that the EU would be solely responsible for breaches, instead presuming an *identical international obligation* for the Member States.¹⁰⁷ This could be seen as an endorsement of a theory of joint responsibility of the Union and the Member States.¹⁰⁸ The WTO DSB is prepared to attribute exclusive responsibility to the Union when applicable: in *EC-Customs*,¹⁰⁹ the WTO Panel, in considering the application and administration of the Community's customs regulations by Member States, concluded that the customs union fell within the exclusive competence of the Community.¹¹⁰ Similarly, in *EC-Geographic Indications*, the Panel concluded that Member States act 'de facto as organs of the Community, for which the Community would be responsible under WTO law and international law in general'.¹¹¹ The WTO panels in *EC-Asbestos* and *EC-Biotech* concluded similarly that in those disputes, measures taken by Member States had been defended by the Union alone, and that responsibility for these measures was attributable to it.¹¹² Taken as a whole, these decisions suggest a willingness in apportioning exclusive responsibility to the European Union when appropriate, as would be the case under a strict control approach through the ARIIO. Yet outside a clear multilateral agreement like the WTO Agreement, an 'exclusivity' approach to responsibility presents particular challenges for accommodating the

¹⁰⁶ However, as a general rule, it is probably fair to state that the WTO's practice is generally to recognise the 'veil' of the European Union to the exclusion of its member States: see A Delgado Casteleiro and J Larik (n 104) 227.

¹⁰⁷ *Panel Report: European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R (adopted 22 June 1998) para 8.16. It also bears nothing that this was in application of a procedural agreement reached between the United States, the United Kingdom, Ireland, and the European Union.

¹⁰⁸ F Hoffmeister (n 59) 732.

¹⁰⁹ *Panel Report, European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006

¹¹⁰ *Ibid.*, para 2.2.

¹¹¹ *Panel Report, European Communities – Geographic Indications*, WT/DS174/R, para 7.725.

¹¹² *Panel Report, European Communities—Measures Affecting Asbestos and Products containing Asbestos*, WT/DS135/R, paras 8.1-8.9; *Panel Report, European Communities – Biotech European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, and WT/DS293/R, paras 7.98-7.100.

European Union, even when recognition of the Union's division of competences is embodied in an international agreement.

B. Shared or Joint Responsibility

Mixed agreements take the European conception and project it onto the international plane. When the Union and its Member States both conclude an international agreement, they are in essence 'uniting' their competence under European law;¹¹³ Member States are guaranteeing the certainty that the obligation will be performed.¹¹⁴ Accordingly, the practice of mixed agreements has thrived, despite the broadening of the Union's exclusive powers through the parallelism doctrine, and it is not motivated by the policy preference that Member States wish to remain 'visible' on the international scene.¹¹⁵ Sheer pragmatism favours the use of mixed agreements in order to ensure recognition of the European Union's internal arrangements as binding on third States.

Given this practice, the concept of shared responsibility¹¹⁶ might help to give conceptual clarity to the European Union's international personality. Within the European legal order, it is already a settled matter that the Union may bear joint or separate responsibility alongside its Member States.¹¹⁷ Yet at international law, shared or joint responsibility is very much the exception, and exclusive responsibility and the relevant articles in the Draft Articles tend to emphasise paradigms of control and indirect responsibility. Under such circumstances recognition by third States of the European structure of apportioning powers and competences would be a requirement to move beyond viewing international responsibility than the insistence of the State as a 'black box'. Nothing

¹¹³ R Schütze (n 21) 81.

¹¹⁴ See MJ Dolmans, *Problems of Mixed Agreements: Division of Powers within the EEC and the Rights of Third States* (The Hague, TMC Asser Press, 1985) 95.

¹¹⁵ R Schütze (n 21) 81.

¹¹⁶ The present author is contributing to a three-volume edited collection for the project on *Shared Responsibility in International Law (SHARES)* led by André Nollkaemper: see www.shares.nl for more information.

¹¹⁷ See Case C-316/91 *European Development Fund: European Parliament v Council of the European Union*, *Re* [1994] ECR I-624, para 29, on the joint liability of the EC and the Member States under the Lome IV Convention. See also Case 327/91 *France v Commission* [1994] ECR I-3641.

is exceptional about developing such a practice: as described above,¹¹⁸ it is accommodated within the application of Article 64 ARIO.

C. Who Responds? Primary and Subsidiary Responsibility

A further point is relevant on a practical level. In the light of the possibility that both the European Union and its Member States can be simultaneously responsible for the breach of an international obligation, to whom is the injured party or State to address a claim? It seems unduly harsh to penalise the aggrieved party for the complex internal arrangements favoured by the Union, but to give it unfettered choice also has substantial drawbacks. The Commentary to Article 48, paragraph 1 of the ARIO relies on the *Parliament v Council* judgment of the ECJ,¹¹⁹ and concludes that if an international organisation and one or more States are responsible for the same internationally wrongful act, the responsibility of each State *and* the international organisation may be invoked in relation to that act: they are jointly liable.¹²⁰ Paragraph 2 is even more interesting: ‘subsidiary responsibility may be invoked insofar as the invocation of the primary responsibility has not led to reparation’. In practice, this means that the subsidiarily responsible entity may only be pursued if the primarily responsible organisation fails to provide reparation, and when it is clear as to how the apportioning of responsibility can proceed. An example of this may be when an international organization has committed a wrongful act that triggers the responsibility of a Member State. Although responsibility of Member States is not presumed to exist as such, such a general

¹¹⁸ See above, section III.B.

¹¹⁹ *Parliament v Council* (n 117).

¹²⁰ ARIO (n 3) Commentary to Article 48, 76, para 1. Interestingly, in European Law the EU agreement in issue in this case, with the African, Caribbean and Pacific groups (‘ACP’ States), is seen as a ‘bilateral mixed agreement’: see PJ Kuijper, ‘International Responsibility for EU Mixed Agreements’ in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: the EU and its Member States in the World* (Oxford, Hart Publishing, 2010) 208, 210.

principle would render nugatory the international personality of an organization.¹²¹ However, under very limited circumstances, a State may be presumed to have subsidiary liability, for example if it has accepted liability explicitly,¹²² or if the conduct of Member States has led a third party to rely on the responsibility of Member States.¹²³ Such presumed subsidiary liability is of course rebuttable.¹²⁴

Two approaches can be taken when a breach of an obligation may be attributed either to a Member State or to the Union. One could be to suggest that the formation of the Union creates an ‘inherent risk’ for Member States, that they could be powerless to comply with an international obligation because of their conflicting obligations under Union law. Under this line of reasoning, the Member States would be unable to invoke European Union law to evade their international obligations. This seems to be the general regime favoured in the ARIIO, with exceptions being made only when third parties recognise European Union law, as they do in the WTO Agreement or the LOSC. More interesting is the second scenario, and to conceive of situations where a claim could be addressed to the Union under a mixed agreement recognising the Union’s competences in certain fields. Returning to risk for a moment, any ‘inherent risk’ relating to the formation of the Union is then assumed by any foreign State or entity that enters into an agreement with the Union *or its Member States* as to the recourses available to it in case of a breach.¹²⁵ In such cases, the conduct would first have to be attributed to a Member State or to the Union; yet this risk cannot apply in situations of

¹²¹ *Ibid*, Commentary to Article 62, 97, 5, cites the Institute of International Law’s 1995 resolution to this effect: ‘there is no general rule of international whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members.’ See (1996) 66-II *Annuaire de l’Institut de Droit International*, 445.

¹²² *Ibid*, 97, paras 6–7.

¹²³ *Ibid*, para 8.

¹²⁴ *Ibid* 99, para 13.

¹²⁵ However, cf A Verdross, ‘Theorie der mittelbaren Staatenhaftung’ (1948) 1 *Österreichische Zeitschrift für öffentliches Recht* 388, who suggests that in dealing with the federated entity, the third State or entity will have recognised the risk; and that it ought to have dealt with the federal government directly in order to avoid these problems.

concurrent, shared or mixed competences, where both the Union and the Member States could conceivably act separately, or they could be acting jointly.

Thus, a paradigm of subsidiary responsibility could help to resolve the conflict.¹²⁶ In complex situations of overlapping competence, the injured party could feel free to address the claim to either the Union or any relevant Member States, guaranteeing the international personality recognised in a mixed agreement, and relieving the dispute-settlement body or court from having to apportion responsibility between the Union and its Member States. Such an overlapping conception of sovereignty suggests that the Member States act as a ‘guarantor’ of the Union’s conduct, having transferred sovereign powers to it. It would not needlessly muddle the conceptual framework;¹²⁷ it would merely encourage third parties to recognise the Union’s internal structure and engage with the appropriate order of government, safe in the knowledge that such engagement would not allow the Union or its Member States to evade their international obligations.

D. Case Study: ECHR Accession

The paradigm of shared responsibility seems to be strongly favoured in the proposed agreement for the accession of the European Union to the European Convention on Human Rights. Although it is true that violations of international human rights obligations do not always automatically entail the international responsibility for that violation in the traditional sense, the conceptual paradigm of shared responsibility is a useful comparator. Up to the present, and perhaps due to its basic mission to provide effective human rights protection,¹²⁸ the ECtHR has generally declined to attribute EU Member States obligations to the Union

¹²⁶ Although cf A Delgado Casteleiro and J Larik (n 104) 237, who argue that joint and several responsibility should only apply to ‘bilateral mixed agreements’, and not multilateral agreements’.

¹²⁷ But cf A Delgado Casteleiro n 103, 510.

¹²⁸ F Hoffmeister (n 59) 735.

and declare claims to be inadmissible (although see *Behrami and Saramati*).¹²⁹ If anything, it has held EU Member States responsible for violations of the Convention found in the EU's primary treaties.¹³⁰ This may be due to the inability of the EU to appear as a respondent in Strasbourg; it has been argued that the WTO and the ITLOS are more prepared to attribute conduct to the Union and not the Member States, given the Union's willingness and capacity to appear as respondent before those two institutions.¹³¹ At present, the EU's inability to appear before the European Court of Human Rights strongly distinguishes it from these institutions.¹³²

The proposed accession agreement of the EU to the European Convention on Human Rights, in application of Article 1 of Protocol No 8 to the Lisbon Treaty, which stipulates that any accession agreement preserve the specific characteristics of the Union and its law, by ensuring that the correct respondent be addressed by any claim to the Court.¹³³ From the perspective of international law, what is relevant for our purposes is the idea that the normative control exercised by the Union over Member States will be recognised, both by the ECHR system but also by ECHR States Parties that are not members of the EU, as a criterion for the attribution of conduct.¹³⁴ What is more, the ECHR accession proposal includes the interesting procedural mechanism of 'co-respondent', through which the Union and its members can be held, as fully parties to the case, 'jointly responsible'¹³⁵ for violations of the

¹²⁹ See eg App. No. 24833/94, *Matthews v United Kingdom*, judgment of 18 Feb. 1999, at para 32, available at: www.echr.coe.int/echr/Homepage_EN. In *Bosphorus*, above n **Error! Bookmark not defined.**, para 153.

¹³⁰ See eg *Matthews v United Kingdom* [GC], no 24833/94, ECHR 1999-I; *Bosphorus*, above n **Error! Bookmark not defined.** Cf. *Connolly v 15 Member States of the European Union*, no 73274/01, 9 December 2008, where there was only EU action, with no member State involvement, and where the Court concluded that the alleged breach was not attributable to the member States because it did not happen within their jurisdiction, the requirement under Article 1 ECHR.

¹³¹ F Hoffmeister, above n 59, 739.

¹³² R Schütze, in 'EC Law and International Agreements of the Member States: An Ambivalent Relationship', (2006–7) 9 *Cambridge Yearbook of European Legal Studies* 387, 399–401, concluded that the ambivalent equivocal practice of the ECtHR vis-à-vis the Community legal order reflected an unsettled relationship, partly due to the inability of the Union to accede to the ECHR.

¹³³ Protocol No 8 to the Treaty of Lisbon [2010] OJ C83/273.

¹³⁴ J d'Aspremont (n 23) 12.

¹³⁵ CoE Doc CDDH (2011) 009 (14 October 2011) 24, para 54.

Convention and bound by any judgment of the ECtHR.¹³⁶ Although appearing as co-respondent is purely voluntary,¹³⁷ in cases where the Member States and the Union appear as co-respondents, the Court would have to consider, whether an allegation against them ‘calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law’.¹³⁸ The issue is not who is competent, but whether a given provision of EU law is at the origin of the breach.¹³⁹

There seem to be sound reasons of principle justifying the co-respondent approach and the emphasis on shared responsibility. Giorgio Gaja has suggested that the main purpose of allowing the Union to become a co-respondent is ‘to defend what it considers to be the proper interpretation of the relevant provisions of EU law and of the ECHR’.¹⁴⁰ Criticism exists: it has been suggested that the Union’s accession to the ECHR will ‘internalise’ ECHR law in EU law, and as such will not qualify them as *lex specialis*,¹⁴¹ and that the voluntary nature of the Union’s participation in proceedings undermines systemic considerations and the possible development of clear rules.¹⁴² For all this, it cannot be denied that EU law, whatever its

¹³⁶ Article 3, para 1, lit b of the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, contained in Council of Europe Doc CDDH (2011) 009 (14 October 2011), seeking to amend Article 36 of the ECHR with the addition of the following paragraph:

4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

¹³⁷ A party shall become co-respondent only at its own request, as it cannot be forced into proceedings where it was not named in the initial application: see CDDH-UE(2011)16, para 47.

¹³⁸ Article 3, para 2 of the Draft Agreement. Article 3, para 3 provides that, where an application is directed against the Union, member States may become co-respondents ‘if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.’

¹³⁹ G Gaja, ‘The “Co-Respondent Mechanisms” According to the Draft Agreement for the Accession of the EU to the ECHR’, (9 January 2013) 2(1) *ESIL Reflections*, 5.

¹⁴⁰ *Ibid.*, 3.

¹⁴¹ J d’Aspremont (n 23) 13.

¹⁴² A Delgado Casteleiro, ‘United We Stand: The EU and its Member States in the Strasbourg Court’ in V Kosta, N Skoutaris and V Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford, Hart Publishing, forthcoming 2014) 12–13. See also: Eckes (n 143) 120.

constitutional nature and status as an autonomous legal order, nevertheless remains subject to the application of international law in relation to human rights. ECHR law may be ‘internalised’, but it remains essentially ‘external’, part of a wider corpus of international law that need not be fraught with irreconcilable conflict.¹⁴³ Moreover, as the Council of Europe’s Steering Group has suggested, the co-respondent mechanism as a means to avoid *lacunae* in participation, accountability and enforceability of the Convention,¹⁴⁴ noting that it is a ‘special feature of the EU legal system that acts adopted by its institutions may be implemented by its Member States and, conversely, that provisions of the EU founding treaties agreed upon by its Member States may be implemented by institutions, bodies, offices or agencies of the EU’.¹⁴⁵ It has been suggested that the attribution of joint responsibility allows the European Court to be unburdened of the delicate task of apportioning responsibility between the Union and its Member States based on the distribution of competences between them: for the Court to do so would nearly certainly have interpretative consequences within the European legal order,¹⁴⁶ and thus undermine the autonomy of EU law.

VI. CONCLUDING REFLECTIONS

There are unfortunately few signs that international law is moving beyond its traditional insistence on the State as the ‘natural’ form of international person. Yet the conceptual challenge posed by an unusual international person like the European Union in international relations remains interesting: besides being able to subscribe to internationally binding

¹⁴³ An excellent analysis of the interplay between the EU and the European Convention is C Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ (2013) 76(2) *MLR* 254.

¹⁴⁴ Council of Europe Accession Proposal (n 135) 20, para 33.

¹⁴⁵ *Ibid.*, 20, para 32.

¹⁴⁶ C Eckes (n 143) 267; T Lock, ‘End of an Epic? The Draft Agreement on the EU’s Accession to the ECHR’ (2012) 31(1) *Yearbook of European Law* 162, 166, especially given the European Court of Justice’s view that it considers itself bound, in cases when the EU is a party to an international agreement that sets up a judicial disputes mechanism, by that judicial mechanism’s interpretation of the international agreement: see *Opinion I/91 re EEA* [1991] ECR I-6079, paras 39-40.

commitments, or be held responsible for breaches or non-compliance with international law, the European Union possesses sovereign powers over territories and peoples that are *already* represented by a State. This overlapping, or interlocked, conception of sovereignty opens new possibilities that international lawyers can, and must, accommodate creatively.

What separates the European Union from traditional international organisations is the extent to which its competences and powers cross over into the internal sphere. Transcending the control of its Member States, and sometimes with the power to compel them against their wishes to comply with a Union obligation, the European Union constitutes an experiment where sovereignty is *divided* between national and supranational levels. In this respect, it is a ‘federation’, akin to but not necessarily identical to a federal State.¹⁴⁷ As such, a divided sovereignty raises interesting wider questions and opens the door to the possibility of shared or joint responsibility.

¹⁴⁷ R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, Oxford University Press 2009) ch 1, for a forceful view that a ‘federation’ must be viewed more broadly than only a ‘federal State’.